STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN CRONIN, Appellant,

v.

DEPARTMENT OF ADMINISTRATION AND DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents.

Case 835
No. 69980
PA(dmrs)-35

Decision No. 34188

Appearances:

Kevin Cronin, Attorney, 1215 Boundary Rd., Middleton, Wisconsin, 53562, appearing on his own behalf.

William Ramsey, Attorney, Wisconsin Office of State Employment Relations, 101 East Wilson St., P.O. Box 7855, Madison WI 53703, appearing on behalf of the Respondents.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter is before the Wisconsin Employment Relations Commission (the Commission) on the Respondents' motion for summary judgment.[1] The final date for submitting written arguments was January 22, 2013.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

[1] As further discussed below, the jurisdictional basis of this appeal is Sec. 230.44(1)(a), Stats. As such, the Division of Merit Recruitment and Selection (DMRS) – a division of the Office of Employment Relations (OSER), must be, and has been, named as a Respondent. In addition, DMRS's counsel also has identified DOA as a Respondent, presumably due to the involvement of Jane Hineline, a Department of Administration (DOA) Human Resources Specialist, in the recruiting process as described below in the Findings of Fact. Because counsel for DMRS also has asserted his representation of DOA as a Respondent in this matter and the Appellant has not objected to the inclusion of DOA as a named Respondent, the Commission accepts that designation as well.

FINDINGS OF FACT [2]

1. Appellant Kevin Cronin applied for an attorney position with the Public Service Commission (PSC) on May 11, 2010.

2. Prior to his application for this position, the Appellant had served as an attorney for the PSC for at least seven years until January 2008.

3. The application for the PSC position for which the Appellant applied on May 11, 2010, included a civil service examination consisting of three questions. The deadline for online applications was May 12, 2010.

4. Travis Dillon, a Human Resources Consultant with DMRS, reviewed the examination questions and approved them as being valid for the position.

5. The Appellant completed the examination online by first preparing his responses to the three questions in a separate word processing document. He prefaced each response with a title summarizing its subject matter.

6. The Appellant then used a copy-and-paste, word-processing feature to transfer his responses into the online application windows corresponding to the three questions. In so doing, however, he inadvertently pasted his title and response to question 1 into the online window corresponding to question 2, and he inadvertently pasted his title and response to question 2 into the online window corresponding to question 1. He did copy and paste correctly his title and response to question 3 into the online window for question 3.

7. The online examination instructions also requested that each applicant attach a resumé and stated in part: "Your resume attached for this recruitment should not exceed 3 pages. The resume will be reviewed during the scoring process."

8. The Appellant attached a nine-page resumé to his online application for the PSC attorney position.

9. Jane Hineline was employed by the Wisconsin Department of Administration in its Bureau of Human Resources as a Human Resources Specialist from March 2001 until sometime after the instant appeal was filed. In that capacity, her duties included the coordination of the hiring activities of the PSC.

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[2] These findings are made solely for the purpose of deciding the Respondents' motion for summary judgment.

10. Ms. Hineline briefed the three examination graders (or "raters") prior to their grading the examinations for the PSC attorney position. In the course of the briefing, each rater was shown a list of the names of the applicants and asked whether they could objectively grade the applicants.

11. Following the applicants' completion of the examinations, the raters graded them by giving a score of 0 – 9 (with 9 being the best possible score) on each of the three questions. They did so with the assistance of written benchmarks that had been provided to them.

12. Following the raters' completion of grading, Travis Dillon did an exam score analysis to measure the reliability (or correlativity) of the grading as between the three graders. He determined that the reliability score exceeded the minimum score required. He also established that the passing point – *i.e.* the lowest acceptable score – for each question on the examination was 4, and that the lowest acceptable score overall for all three questions was 12.

13. Travis Dillon then determined as eligible for advancement to the interview stage of the hiring process, all candidates who had received an acceptable score of at least 12 overall from at least two-thirds of the raters. As a result of this process, the 45 candidates with the highest examination scores were determined to be eligible for advancement to the interview stage and were included on a Registrant Report.[3] The other candidates who had taken the examination were determined to be not eligible.

14. The Appellant received overall examination scores (i.e. combined scores on all three questions) of 5 and 8 from two of the examination raters who were PSC attorneys and who had worked with the Appellant at the PSC. The Appellant received an overall score of 20 from a non-PSC rater.

15. On or about June 1, 2010, the Appellant was determined to be "Not Eligible" to advance to the interview stage of the hiring process and was not included on the Registrant Report.

16. Jane Hineline prepared a shorter, alphabetical list of 17 certified candidates for the position (the "Alpha List" or "Certified List").

17. Ms. Hineline developed the Alpha List of 17 candidates by selecting some of the

[3] Although Jane Hineline's affidavit (¶ 16) and the Respondents' initial brief (p. 3) aver that *46* eligible applicants were included in the Registrant Report, the latter document (Resp't Ex. 16) contains 45 names and states, "Registrant List: (Total: 45)". We thus conclude that the Registrant Report contained a list of 45 candidates who had taken the examination as being eligible for interview.

highest ranked applicants from the Registrant Report and other applicants from other sources, in the following manner. Using the "rule of 10", she initially included on the Certified List the 10 applicants on the Registrant Report with the highest overall examination scores. However, one additional applicant was added to the Certified List, because the tenth and eleventh ranked applicants had identical examination scores. An additional 2 applicants were added to the Alpha List by virtue of the addition of veterans preference points to their scores. Moreover, 3 minority applicants were added to the Certified List, because the position was identified as underutilized for minorities. Finally, one applicant was added to the Alpha List as a disabled eligibility certification.

18. When Jane Hineline provided the Alpha List of 17 candidates to the PSC, none of the candidates' examination scores was revealed.

19. In addition to the 17 candidates on the Alpha List, two other candidates qualified for an interview for reasons unrelated to examination scores. One such applicant was a transfer candidate and the other candidate was the Appellant.

20. The transfer candidate qualified for an interview pursuant to provisions of the Wisconsin State Attorneys Association's collective bargaining agreement.

21. The Appellant was allowed to interview pursuant to a request that he had made on June 8, 2010, to exercise permissive reinstatement rights, based on his previous employment as an attorney with the PSC. He made this request after having discovered that his examination score did not qualify him for an interview.

22. The Appellant's request for an interview was granted, based on permissive reinstatement rights.

23. Jane Hineline forwarded to the PSC the resumés of the candidates to be interviewed, including the Appellant's resumé.

24. All candidates to be interviewed, including the Appellant, were required to take a writing test.

25. The Appellant took the writing test and interviewed for the attorney position with the PSC.

26. The Appellant was not selected for the attorney position with the PSC.

27. The PSC will not reuse the Registrant Report referenced in Findings 13, 15,

and 17 above that had been created as part of the hiring process for the PSC attorney position at issue in this appeal. Rather, if the PSC were to seek to fill another attorney vacancy, the PSC would start a new recruitment and develop a new register.

Based on the foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. As the moving parties, the Respondents have met their burden to show that this appeal should be dismissed as moot.

2. The Appellant's request for summary judgment is denied.

Based on the foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER [4]

This appeal is dismissed as moot, and the Appellant's request for summary judgment is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 9th day of July, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

[4] Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Cronin v. Department of Administration and Department of Merit Recruitment and Selection

MEMORANDUM ACCOMPANYING ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

I. SUMMARY JUDGMENT STANDARD

This appeal is before the Commission on a motion for summary judgment. "The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Galligan v. DOC and DMRS, Dec. No. 32987 (WERC, 2/2010) *quoting* Czynzak-Lyne v. OSER, Dec. No. 32633 (WERC, 12/2008) (citations omitted). When deciding a motion for summary judgment, we have noted the following factors relevant to resolving a matter filed under Sec. 230.44, Stats.:

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.

2. *Whether a particular Appellant could be expected to have difficulty responding to a dispositive motion.* An unrepresented Appellant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as an Appellant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.

3. *Whether the Appellant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented Appellant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by Respondent for which the facts and related documents are solely in Respondent's possession.

4. *Whether the Appellant has engaged in an extensive pattern of repetitive and/or predominantly frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

Galligan v. DOC and DMRS, Dec. No. 32987 (WERC, 2/2010) *quoting* Czynzak-Lyne v. OSER, Dec. No. 32633 (WERC, 12/2008) (citations omitted).

Applying these four factors respectively suggests that a disposition of the Respondents' motion for summary judgment is appropriate herein. First, the Respondents' motion does not invoke disputes over subjective intent or other factual issues; rather, we must decide whether the appeal should be dismissed as moot based on undisputed facts. "The application of undisputed facts to a legal standard is a question of law . . . ." Delta Group, Inc. v. DBI, Inc., 204 Wis. 2d 515, 521, 555 N.W.2d 162, 165 (Ct. App. 1996), *citing* Towne Realty, Inc. v. Zurich Ins. Co., 201 Wis. 2d 260, 267, 548 N.W.2d 64, 66 (1996). *See also* McFarland State Bank v. Sherry, 2012 WI App 4, ¶ 9, 338 Wis. 2d 462, 469, 809 N.W.2d 58, 62, *citing* State ex rel. Milwaukee County Personnel Review Board v. Clarke, 2006 WI App 186, ¶ 28, 296 Wis. 2d 210, 723 N.W.2d 141 ("As a general matter, the question of whether a case is moot is a question of law . . . .") Second, although the appellant appears *pro se*, he is an attorney whose experience includes involvement in administrative proceedings as PSC staff counsel. Third, as an experienced attorney, the Appellant is expected to be able to do discovery, and he has in fact availed himself of discovery in this matter. Finally, the fourth factor is insignificant, because the Appellant has not engaged in repetitive or frivolous litigation. In light of these factors, this appeal lends itself to disposition on summary judgment.

Although the Appellant does not take issue with this conclusion, on May 8, 2013, he did file an objection *via* email to the competence of the Commission to decide this motion, based on the Commission not issuing its decision within the 90-day period specified in Sec. 230.44(4)(f), Stats. On May 9, 2013, the examiner assigned to this appeal responded *via* email to the Appellant as follows, in relevant part:

> Your objection to the competency of the Commission to decide the above-captioned appeal based on the passage of more than 90 days since the Commission's receipt of the parties' submissions is noted. However, I respectfully disagree with your position:
>
> > Statutes setting time limits on various activities have often been held to be directory despite the use of the mandatory "shall," where such a construction is intended by the legislature. This court has stated that "a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation." State v. Industrial Comm'n, 233 Wis. 461, 466, 289 N.W. 769, 771 (1940).

> Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 571, 263 N.W.2d 214, 217 (1978) (footnote omitted).

We agree with both the examiner's authority to rule on this objection and his ruling. While the examiner would not have authority to dismiss this appeal,[5] he does have the authority to issue a ruling that the Commission has not lost competence to hear and decide the instant motion for summary judgment. We concur with the examiner's conclusion that we have not lost competence to issue a decision and order.

The Appellant argues that under Sec. 230.44(4)(f), Stats., the Commission has 90 days to decide this motion and loses competence to do so, after the 90 days have passed. Section 230.44(4)(f), Stats., provides, "The commission shall issue a decision on an action under this section within 90 days **after the hearing on the action is completed**." (emphasis added) Here, no hearing has been held and thus Sec. 230.44(4)(f), Stats. does not apply.

II. MOTION FOR SUMMARY JUDGMENT

The Respondents advance two primary arguments in support of their motion: 1) the appeal is moot; and 2) the Appellant "can point to no decision made or delegated by the Administrator [under Sec. 230.44(1)(a), Stats.] that is contrary to the Civil Service Code and the applicable administrative rules." (Resp't Initial Br. 6). As shown below, we need not address the Respondents' second argument regarding the merits of the appeal, because the appeal is moot, and because no "exceptional or compelling circumstances" exist that would warrant our consideration of the merits, notwithstanding mootness. City of Racine v. J-T Enterprises of America, Inc., 64 Wis. 2d 691, 702, 221 N.W.2d 869, 875 (1974). Before considering the issue of mootness, however, clarifying the nature of the action subject to this appeal and its jurisdictional basis is helpful.

III. NATURE OF ACTION APPEALED AND JURISDICTIONAL GROUND

The Appellant identified the action subject to appeal as follows:

> This appeals the decision of the administrator of the Division of Merit Recruitment and Selection (respondent) on June 1, 2010, concluding the petitioner, Kevin B. Cronin (petitioner) was not eligible to compete for the position of attorney for the Public Service Commission of Wisconsin, Job Announcement Code: 1001176 (job announcement).[6]

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[5] Section PC 5.01(2), Wis. Adm. Code, provides in pertinent part, "no hearing examiner shall decide any motion which would require final disposition of any case except when the commission has by order directed that the hearing examiner's decision shall be the final decision of the commission."

[6] Appellant's letter of appeal, filed July 1, 2010.

In addition, the Appellant indicated in two prehearing telephone conferences that the jurisdictional basis of his appeal is Sec. 230.44(1)(a), Stats. Thus, the Appellant is solely appealing his exam result of "Not Eligible"; he is not appealing the selection of another candidate for the position under Sec. 230.44(1)(d), Stats.[7] Consistent with the limited scope of this appeal, the Appellant has not named the PSC, the appointing authority who made the selection decision, as a party Respondent. Finally, he again acknowledged in his brief his examination result of "Not Eligible" as the action appealed and Sec. 230.44(1)(a), Stats., as the jurisdictional basis of his appeal.[8]

IV. MOOTNESS DOCTRINE

The Respondents raise the defense of mootness, which invokes two issues: whether the appeal is moot, and, if so, whether the Commission nevertheless should hear the appeal.

A. Whether the Appeal Is Moot

The Commission has recognized the doctrine of mootness as defined by the Wisconsin Court of Appeals:

> In its recent ruling in DVA (Demoya), Dec. No. 32026-8 (WERC, 2/07), the Commission quoted State Ex Rel. Olson v. Litscher, 2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425 for the proposition that "[a]n issue is moot when its resolution will have no practical effect on the underlying controversy. . . . In other words, a moot question is one which circumstances have rendered purely academic."

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[7] Sections 230.44(1)(a) and 230.44(1)(d), Stats., respectively provide:

> **(1)** APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45 (1) (a):
>
> > **(a)** *Decision made or delegated by administrator*. Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2).
> >
> > . . .
> >
> > **(d)** *Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

[8] Br. of Appellant in Opp'n to Mot. for Summ. J., 1, 3.

Fabert v. DNR , Dec. No. 32089 (WERC, 5/2007).

1. Application of Mootness Definition

Even assuming *arguendo* that the Appellant's examination was improperly scored in violation of civil service laws,[9] we conclude that the issue on appeal is moot. The action challenged on appeal is the determination, in the Appellant's words, that he "was not eligible to compete for the position of attorney for the Public Service Commission of Wisconsin,"[10] due to the allegedly improper scoring of his examination in violation of civil service laws. Had the Appellant received, as he maintains he should have, a score on his examination sufficient for his inclusion not only on the Registrant Report but also the Certified List, he would have been allowed to interview for the position – the next step in the hiring process following certification. However, notwithstanding his examination grade of "Not Eligible", the Appellant ultimately was granted an interview, based on permissive reinstatement rights. Thus, resolving whether his examination was improperly scored in violation of civil service laws would have no practical effect on the underlying controversy regarding his ineligibility to continue to compete for the position at the interviewing stage: he ultimately was allowed to – and did – interview for the position. Any issues, moreover, relating to the post-certification hiring process (including the Appellant's non-selection) exceed the purview of our subject matter jurisdiction, because the jurisdictional basis of this appeal is Sec. 230.44(1)(a), Stats., not Sec. 230.44(1)(d). *See* Paul v. DHSS & DMRS, Case No. 82-156-PC (Pers. Comm. 6/19/86) (distinguishing Sec. 230.44(1)(a), Stats., which grants the Commission the authority to review actions delegated by the Administrator of the Personnel Division (now the Division of Merit Recruitment and Selection), including certification actions, from Sec. 230.44(1)(d), Stats., which authorizes the Commission to review post-certification actions related to the hiring process, including non-selection.)

2. Consideration of Appellant's Arguments

The Appellant counters the Respondents' mootness defense with various arguments that are ultimately unavailing. Some of these arguments can be disregarded, because they go to the merits of issues that the Appellant raises and beg the question of mootness. For example, the Appellant argues that his examination score of "Not Eligible" is not justified by any affidavits from the scoring panel and violates the civil service laws, including their express policy of liberal interpretation to select candidates of merit and fitness. The Appellant also points out the examination instructions did not mention that a "clerical error," as the Appellant characterizes

[9] The Commission does not address the merits of any examination scoring issues. Considering the merits of such issues is not necessary to resolve the issues of mootness and whether the Commission should hear the merits of examination scoring issues, notwithstanding mootness.

[10] Appellant's letter of appeal, filed July 1, 2010.

his inadvertent transposition of answers, would result in his ineligibility. He concludes that such an adverse consequence without an express warning effectively constitutes administrative rule-making without proper promulgation. However, our application of the mootness doctrine may assume *arguendo* not only unlawful scoring of his examination but also deficient instructions to it. Similarly immaterial to the mootness defense is the Appellant's contention that the permissive language in the examination instructions specifying that an applicant's resumé "should not exceed 3 pages" authorized the Appellant to submit a nine-page resumé. For the applicability of mootness is predicated on the effective rescission of the Appellant's non-eligibility by virtue of the interview he was granted – an undisputed fact that no legal challenge to the scoring, content, or administering of his examination disturbs. To conclude otherwise would not only contravene the definition of mootness but also frustrate "the interest of judicial economy" underlying the doctrine. Matter of G.S., 118 Wis. 2d 803, 805, 348 N.W.2d 181, 182 - 183 (1984), *citing* State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis. 2d 220, 228, 340 N.W.2d 460, 464 (1983). Mootness applies when circumstances have changed (here, the effective rescission of the Appellant's initial ineligibility for an interview), such that the resolution of the underlying issues (the allegedly illegal scoring) can no longer have any practical effect on the underlying controversy (the Appellant's eligibility).

The Appellant also challenges the applicability of mootness on grounds other than whether the facts of this appeal satisfy the definition. For example, he argues that his pending age discrimination complaint on the same facts establishes that his "appeal is ripe."[11] This is because, according to the Appellant, his age discrimination complaint involves the same parties, the same facts, the same scoring issues, and the same equitable remedies as here. Significantly, the same equitable remedy of appointment to the attorney position that lies in his age discrimination complaint alleging the respondents' act to bar him from PSC employment based on age also lies for an appeal *under § 230.44(1)(d), if filed*. (Br. of Appellant in Opp'n to Mot. for Summ. J. 5-6) (emphasis added). This argument is unpersuasive, however, because the Appellant filed his appeal under Sec. 230.44(1)(a), Stats., not Sec. 230.44(1)(d). Furthermore, he points out that administrative agency decisions, including the Commission's, are not binding precedent. This statement is generally correct, as far as it goes; however, the Wisconsin Court of Appeals set forth the definition of mootness that we apply herein and have applied in prior decisions such as Fabert v. DNR, Dec. No. 32089 (WERC, 5/2007). *See* State ex rel. Olson v. Litscher, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 688, 608 N.W.2d 425, 427. To the extent that the Appellant's arguments would require us to change that definition, he does not explain whether we could, or on what basis we should, disregard the authority of a Wisconsin Court of Appeals opinion. Moreover, "it is well-established law in Wisconsin that

[11] We interpret in context the Appellant's use of the term, "ripe" to mean "not moot," even though this usage may not be entirely accurate. *See* Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (U.S.N.Y. 1975) (distinguishing ripeness, which goes to "whether the harm asserted has matured sufficiently to warrant judicial intervention," from mootness, which addresses "whether the occasion for judicial intervention persists").

administrative agencies may deviate from prior agency policy and practice *as long as a satisfactory explanation is provided*. *See* Wis. Stat. § 227.57(8)." Stoughton Trailers, Inc. v. Labor and Industry Review Com'n, 2006 WI App 157, ¶ 27, 295 Wis. 2d 750, 769, 721 N.W.2d 102, 112 (emphasis added). Here, the Commission is not deviating from prior policy or practice as set forth in its decisions; rather, insofar as the Appellant urges us to disregard the significance of his interview in our analysis of mootness, he effectively asks us to deviate from our prior decisions – an invitation we decline.

The Appellant offers various reasons for which the granting of an interview should not dispose of the mootness issue. First, he argues that the Commission's prehearing conference memorandum precludes its consideration of remedy on summary judgment: "The parties agreed during the pre-hearing conference on April 27, 2010, the summary judgment motion went to the appellant's application actions and the remedy, if any, would be determined at a later date." (Br. of Appellant in Opp'n to Mot. for Summ. J., 17.) In support of this contention, he quotes portions of a prehearing conference memorandum dated April 29, 2011, pertaining to a prehearing conference held on the same date.[12] However, the prehearing conference memorandum sent on April 29, 2011 neither expressly nor implicitly precludes the Commission's consideration of remedy in its mootness analysis on summary judgment. The memorandum states in pertinent part:

> Attorney Ramsey raised the question of the scope of the Commission's remedial authority in this case. While there was some discussion of this concern, the parties agreed to postpone a more detailed discussion until a later date, if appropriate. I encouraged the parties to continue a dialogue on that subject.

The parties' agreement to postpone a more detailed *discussion* of remedy until a later date, *if appropriate*, and the examiner's encouragement for them to continue a dialogue on that subject, did not expressly or implicitly preclude the Respondent from raising, or the Commission from considering, the relevance of remedy to mootness as a ground for summary judgment.

To the contrary, prior decisions by the Commission support the relevance of remedy to the defense of mootness. In some of these cases, the Commission has relied on the absence of a meaningful remedy to conclude that an appeal is moot. For example, in Fabert v. DNR, Dec. No. 32089 (WERC, 5/2007), the Commission deemed moot the appeal of the DNR's decision not to recall the Appellant to an announced vacancy pursuant to his asserted restoration rights, because the vacancy had been cancelled:

[12] We assume that the Appellant's reference to "the pre-hearing conference on April 27, 2010", was in error, and that he meant to refer to the prehearing conference and memorandum of April 29, 2011.

> Despite the cancellation of the vacancy and the Respondent's motion to dismiss the appeal, the remedy that Fabert seeks in this appeal is still "an offer of reappointment without competition to the [cancelled position]. If the Commission denied Respondent's motion, if the matter proceeded to hearing and if there was a finding on the merits for Fabert, the only remedy the Commission could impose at that point would be to "reverse and remand" the 2006 decision [not to restore Fabert to his cancelled position.]

Id. Similarly, in Burns v. UW-Madison [UWHCA], Case No. 96-0038-PC-ER (Pers. Comm. 4/8/98), the Personnel Commission deemed the controversy moot, because the Appellant had ceased employment with the Respondent and the potential remedies would have been effective only if she were still so employed.

The Commission has dismissed other appeals based on mootness, where, following the filing of the appeal but prior to hearing, the Appellant was granted the remedy sought and/or available. For example, in Friedrichs v. DOC, Case No. 96-0023-PC (Pers. Comm. 11/22/1996), the Personnel Commission determined that the appeal of a three-day suspension was moot when the employer, DOC, retracted the suspension: "it is undisputed that the remedy sought by the appellant and the only remedy available to him in an appeal of a disciplinary suspension, *i.e.*, the rejection of the suspension, has been carried out by respondent and any decision by the Commission could not have any practical legal effect." Id. *Accord* Klemmer v. DHFS, Case No. 97-0054-PC (Pers. Comm. 4/8/1998) (finding an appeal of a disciplinary suspension to be moot, where the employer subsequently rescinded the suspension and the Commission could not, as in a discrimination case under the Wisconsin Fair Employment Act (WFEA), issue a cease and desist order); Maday v. DOC & DER, Case No. 92-0838-PC (Pers. Comm. 6/23/93) (deciding that an appeal of the effective date of a reclassification became moot when the employer agreed to use the earlier effective date sought by the Appellant and the issue was unlikely ever to arise again).

The rationale for applying mootness in Friedrichs, Klemmer, and Maday – namely, the granting of the requested and/or available relief following the filing of the appeals – applies with even greater force in this matter. For here, the Appellant was effectively granted a fuller remedy (an interview) than any remedy the Commission could have ordered, if we were to hear, and the Appellant were to prevail on, the merits of his appeal. Under Sec. 230.44(4)(c), Stats., if the Appellant were to prevail on the merits at hearing, the Commission could modify or reject the appealed action (the Appellant's score of "Not Eligible") and "remand the matter to the person taking the action for action in accordance with the decision."[13] We assume

[13] Section 230.44(4)(c), Stats., provides in relevant part:

without deciding that this statutory scope of remedial authority could include an order for two graders to rescore the first two questions of the Appellant's examination based on the responses he had intended to give, and would have given, to each question, but for his error of transposition. We further assume without deciding that the order could contain a conditional directive: 1) to modify the Appellant's examination result from "Not Eligible" to "Eligible" and to add the Appellant's name to the Registrant Report, if at least one of the two raters rescoring the examination were to give a passing grade of 12 or more points,[14] and 2) to add his name to the certified list, if his score were high enough to be added to the list when using the "rule of 10." Yet even on this, the Appellant's best day if the merits of his appeal were considered, the Commission would not have the remedial authority to order that he be interviewed for the position at issue or for any future attorney vacancies at the PFC.

We conclude as much for the following reasons. First, the position at issue herein was filled, and the selected candidate could not be replaced without a showing of obstruction or falsification under Sec. 230.44(4)(d), Stats.[15] Because the Appellant has not argued, nor does the evidence presented on this motion support, any such obstruction or falsification, the Appellant could not interview to unseat the incumbent. Second, the Commission could not order that the Appellant be selected, interviewed, or added to the registrant report or certified list for any future attorney vacancies at the PFC, because 1) selection for a future position would exceed our subject matter jurisdiction under Sec. 230.44(1)(a), Stats.; 2) if the PSC were to fill another attorney vacancy, it would start a new recruitment and develop a new register; and 3) whether the Appellant's rescored examination would entitle him to inclusion on a future register or certified list could not be determined, because neither the identities nor the examination scores of candidates for future positions are known. Consequently, the interview granted to the Appellant is a fuller remedy than any remedy he could be awarded, if we were to consider the merits of any examination scoring issues. Therefore, those issues are moot.

> **(c)** After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or the arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision.

[14] Our assumption is based on Findings 13 and 14, which note that the Appellant received a passing score of 20 from one of the examination raters, and that eligibility for advancement in recruitment required a score of at least 12 overall from at least two-thirds of the raters.

[15] Sec. 230.44(4)(d), Stats., provides, "The commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43 (1)."

Similarly vulnerable to a mootness defense is the Appellant's contention that he was on unequal footing with the other interviewees, because he had to exercise reinstatement rights to obtain an interview, his name was not on the certification list, and the absence of his name on that list created "adverse implications." As a result, the Appellant continues, the PSC selected a candidate with significantly less experience in violation of the civil service requirement to select candidates based solely on merit. (Appellant's Br. 17.) By "adverse implications," the Appellant presumably suggests that those conducting the interview and participating in the selection decision inferred from the original absence of the Appellant's name on the certification list and the later addition of his name by virtue of his reinstatement rights that he was not as qualified as the candidates on the list. Yet even assuming *arguendo* the plausibility of this inference, the Appellant's argument goes to the post-certification hiring process. As such, his argument could only be considered on appeal if he had named the PSC as a party and appealed his non-selection under Sec. 230.44(1)(d), Stats. Had he done so, evidence germane to the hiring process up to, and including, certification could have been considered not only with respect to claims under Sec. 230.44(1)(a), Stats., but also claims under Sec. 230.44(1)(d), Stats., insofar as such evidence allegedly impacted his non-selection. *See, e.g.*, Paul v. DHSS & DMRS, Case No. 82-156-PC (Pers. Comm. 6/19/86) (considering evidence of illegal certification germane not only to a claim under Sec. 230.44(1)(a) but also Sec. 230.44(1)(d), Stats., where Appellant would have been selected, but for the illegal action of certifying the successful candidate.)

Cronin's reliance on Paul regarding the remedy available in this appeal is misplaced, because the remedy in Paul – an order to appoint the appellant, if still qualified, to the disputed position or a comparable position upon its next vacancy – was possible only because the appellant, unlike Cronin, had filed his appeal under both Sec. 230.44(1)(a) *and Sec, 230.44(1)(d), Stats.* In Paul, the appellant, a white male, challenged as illegal both the use of expanded certification to achieve a balanced work force pursuant to an administrative rule and the selection of a black male, Warren Young, for the position in question. The appellant challenged the use of expanded certification pursuant to Sec. 230.44(1)(a), Stats., and his non-selection pursuant to Sec, 230.44(1)(d), Stats. The Personnel Commission concluded in relevant part that because the application of the administrative rule regarding expanded certification, pursuant to which Young was certified, conflicted with a state statute, the rule was invalid and the certification of Young was illegal. The Commission further concluded:

> But for the illegal action of certifying Mr. Young's name as eligible for appointment, Mr. Young could not have been selected for appointment. S. 230.25(2), Stats. Therefore, the decision of DHSS to appoint Mr. Young to the ISD-1 position at MMHI was also illegal.

Id. Having so found, the Commission reasoned as follows regarding the appropriate remedy:

> In Pearson v. UW, 84-0219-PC (9/16/85), the Commission held that in a successful appeal *under s. 230.44(1)(d), Stats.* it lacked the authority to remove an incumbent (see s. 230.44(4)(d), Stats.) but ordered the respondent to "appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy." . . .
>
> The facts in Pearson appear analogous to those in the present case and the Commission enters an identical order here. Everything in this record indicates that if Mr. Young had not been eligible for appointment to the ISD-I position at MNHI, the appellant would have been so appointed.

Id. (emphasis added). Thus, Cronin's request based on Paul for an order to appoint him to the disputed position or a comparable position upon its next vacancy must be rejected; the remedy in Paul (and Pearson) was only available because the appellants in those cases had appealed their non-selection under Sec. 230.44(1)(d), Stats. We decline Cronin's invitation effectively to bootstrap a remedy for an appeal under Sec. 230.44(1)(d), Stats., into this, an appeal under Sec. 230.44(1)(a), Stats.

Nor are we persuaded by Cronin's remaining arguments challenging the applicability of mootness. He points out, for example, that he would not have been interviewed, but for his "fortuitous exercise of his reinstatement rights after the respondents disqualified him for the position." Appellant's Surrebuttal Br. 4. However, for the reasons discussed above, the interview itself renders scoring issues moot, irrespective of the measures the Appellant took to secure the interview. Moreover, the Appellant argues,

> To conclude appellant's appeal here is moot renders render [sic] arbitrary and meaningless the scoring of civil service exams, denies any applicant the equal protection of the civil service laws, and reduces civil service recruitment to fancy and politics and not to law. The state should follow its own laws and be required to do so here.

Appellant's Surrebuttal Br. 4. Because the Appellant's equal protection argument is wholly undeveloped, we need not consider it.[16] Moreover, the equitable considerations as perceived and raised by the Appellant fail to recognize that his interview was a fuller remedy than the

[16] Elsewhere in his briefing, the Appellant asserts, "The respondents' actions toward the appellant violate his right to equality under Art. I, § 1, Wis. Constitution and to due process under U.S. Const. amend. XIV, § 1. This argument establishes it as a placeholder." Br. of Appellant in Opp'n to Mot. for Summ. J., 19. While the Appellant here cites specific parts of the Wisconsin and United States Constitutions, he provides absolutely no constitutional analysis. Like our higher courts, "[w]e may, of course, disregard undeveloped arguments." Anderson v. Hebert, 2013 WI App 54, ¶ 18, 2013 WL 791392, 4, *citing* State v. Flynn, 190 Wis. 2d 31, 39 n. 2, 527 N.W.2d 343 (Ct. App. 1994).

Commission could have awarded him on the merits of any examination scoring issues. In any event, his equitable concerns cannot supplant our analysis applying the legal definition of mootness to the facts of this appeal and concluding that the examination scoring issues are moot.

Finally, we disagree with the Appellant's arguments challenging the hearing examiner's request for additional submissions regarding the possible reactivation of the employment register, pursuant to Sec. ER-MRS 11.03(2), Wis. Adm. Code, and the possible relevance of such reactivation to mootness.[17] If the register were to be reactivated to fill future PSC attorney vacancies, then Cronin's inclusion on it (depending on his ranking after rescoring) might impact his certification for those vacancies. In that event, the scoring issues he raises on appeal arguably would not be moot; their "resolution" could have a "practical effect on the underlying controversy" (*i.e.*, his inclusion on, or exclusion from, the register), which, in turn, might impact his eligibility to compete for future vacancies. Fabert v. DNR , Dec. No. 32089 (WERC, 5/2007), *quoting* State Ex Rel. Olson v. Litscher, 2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425. The Appellant, however, argues that the examiner's request for additional submissions evinces bias against him, and that the examiner had no legal authority to make the request *sua sponte*.

We disagree with both arguments, because the examiner's request for additional submissions could not have put the Appellant in a worse position, and, to the contrary, could have benefitted him, depending on the content of those submissions. None of the parties addressed in its briefing the possible relevance of Sec. ER-MRS 11.03(2), Wis. Adm. Code, to mootness, nor did the evidence submitted clearly address whether the register might be reactivated in the future. Accordingly, the hearing examiner could simply have ignored the possible significance of Sec. ER-MRS 11.03(2), Wis. Adm. Code; had he done so, there would have been no need for additional submissions and the Appellant would have fared no better against the prevailing mootness defense. Alternatively, the examiner could, as he did, invite additional briefing and/or submission of evidence (assuming for the moment that he had the legal authority to do so). Under this alternative, the Appellant might have staved off a mootness defense, had the Respondents submitted proof that they might reactivate the register to fill future vacancies. Thus, we reject the Appellant's assertion that the hearing examiner's

[17] Section ER-MRS 11.03(2), Wis. Adm. Code, provides:

> **Reactivation of register.** The administrator may reactivate a register up to 3 years from the date it was established. Names on the reactivated register may be integrated with those on a subsequently established register.

request for additional evidence and argument implies "bias in favor of the respondents DOA and DMRS and bias against appellant Cronin." (Appellant's Letter Br. of 1/18/13).[18]

We are similarly unconvinced by Cronin's challenge to the legal authority of the examiner to request additional submissions regarding matters not raised by either party. He first notes that under Sec. 227.46(1)(f), Stats., a hearing examiner in a contested case may "[h]old conferences for the settlement or simplification of the issues by consent of the parties." He then argues that rather than simplifying the issues, the "examiner's action on behalf of the respondents renders the issues in this proceeding more complex." (Appellant's Letter Br. of 1/18/13). However, the Appellant appears to confuse the statute's express purposes for holding a prehearing conference (the settlement or *simplification* of the issues) with the existence of issues themselves and/or the examiner's authority to identify and receive evidence relevant to them. While simplifying issues is an express purpose of a prehearing conference, that purpose does not preclude the examiner (or any party) from identifying issues or potential issues. Section 227.46(1)(c), Stats., moreover, authorizes examiners to "receive relevant evidence." And Sec. 227.46(1)(i), Stats., gives them the authority to "[t]ake other action authorized by agency rule consistent with this chapter." Under Sec. PC 4.01(1), Wis. Adm. Code, the purposes of prehearing conferences include "provid[ing] an opportunity to formulate a statement of the issue or issues presented by a case," and Sec. PC 1.09, Wis. Adm. Code, permits the hearing examiner or the Commission to "establish a briefing schedule on any issue or motion pending before it". Under these statutory and administrative provisions, the examiner did not exceed his authority by requesting a prehearing conference on what he perceived to be a pending issue in the appeal (the possible reactivation of the register), in order to discuss and possibly simplify that issue and the issue of mootness. He was also within his authority to request briefing on the possible pertinence of Sec. ER-MRS 11.03(2), Wis. Adm. Code, to the Respondents' mootness defense and to request and receive evidence relevant to the possible reactivation of the register.[19]

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[18] A hypothetical alternative (one argued by neither party) would have been for the examiner simply to reject the Respondents' mootness defense based on Sec. ER-MRS 11.03(2), Wis. Adm. Code, and the absence of evidence that the Respondents would not reuse the register in the future. However, there are at least two shortcomings to this alternative. First, it would have required the examiner to reject the Respondents' defense based on legal authority and argument never raised by the Appellant and indeed without argument from either party. Second, nothing would have prevented the Respondents from raising the mootness defense again in another summary judgment motion supported by 1) evidence indicating that the register will never be reused, and 2) argument that Sec. ER-MRS 11.03(2), Wis. Adm. Code, is therefore not a sufficient basis to defeat the defense of mootness. Revisiting the mootness issue as the basis for yet another summary judgment motion would undermine a fundamental purpose of summary judgment: to "avoid a potential waste of judicial time and resources," Lentz v. Young, 195 Wis. 2d 457, 466, 536 N.W.2d 451, 455 (Ct. App. 1995).

[19] The spirit of our conclusion also accords with our Supreme Court's observation that whether a court properly exercises its discretion in deciding an issue *sua sponte* depends on whether it affords the parties notice and opportunity to argue the issue. *See, e.g.,* State v. Holmes, 106 Wis. 2d 31, 40-41, 315 N.W.2d 703, 708 (1982) (finding unpersuasive an objection to a circuit court raising an issue *sua sponte* "on the grounds of the theoretical

B. Whether the Commission Should Hear the Merits, Despite Mootness

The Appellant maintains that even if his appeal is moot, the scoring issues should be considered based on exceptions to the mootness doctrine.[20] He is generally correct that "there are exceptions to the rule of dismissal for mootness." State ex rel. Olson v. Litscher, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 688-689, 608 N.W.2d 425, 427, *citing* Warren v. Link Farms, Inc., 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985); Shirley J.C. v. Walworth County, 172 Wis. 2d 371, 375, 493 N.W.2d 382 (Ct. App. 1992). However, "[m]oot cases will be decided on the merits only in the most exceptional or compelling circumstances." City of Racine v. J-T Enterprises of America, Inc., 64 Wis. 2d 691, 702, 221 N.W.2d 869, 875 (1974). The Court of Appeals has described those exceptional circumstances as follows:

> We will consider a moot point if "the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts." *Warren*, 123 Wis. 2d at 487, 368 N.W.2d 688. Furthermore, we take up moot questions where the issue is "likely of repetition and yet evades review" because the situation involved is one that typically is resolved before completion of the appellate process. *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983).

State ex rel. Olson v. Litscher, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 688-689, 608 N.W.2d 425, 427. The two exceptions on which the Appellant relies are 1) the issue has great public importance, and 2) the issue is likely of repetition and yet evades review. Id. As discussed below, however, we are not persuaded that either exception applies in this matter.

First, we disagree that the scoring issues raised by the Appellant are likely to arise again but evade review. The Appellant identifies no personnel appeal decision, nor are we aware of any, that involved scoring issues based on a job applicant's transposition of answers to examination questions. In addition, we deem such issues unlikely to arise again, because, with all due respect to the Appellant, a transposition error is preventable with even a modicum of care. Had the Appellant exercised the slightest care when cutting and pasting his responses to the first two of only three examination questions, he would not have made the error. And had the Appellant proofread his answers to the first two questions but once, with the minimal

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impropriety of the circuit court's usurping the function of counsel or interfering with the adversary system or of the theoretical unfairness to the litigants", where "the circuit court [gave] the litigants notice of its consideration of the issue and an opportunity to argue the issue.")

[20] The Appellant made this argument for the first time in response to the examiner's invitation for additional briefing and evidence regarding the possibility of the register being reactivated pursuant to Sec. ER-MRS 11.03(2), Wis. Adm. Code. We shall address his argument, even though it arguably exceeds the scope of the additional submissions.

attention required to realize that the content of his answers did not jibe with the corresponding questions, he would have caught, and could have corrected, his errors. Even assuming that his relatively low scores from two graders were the result of their decision not to "un-transpose" his answers, and that their scoring somehow violated the civil service laws, we doubt that an error so easily preventable is likely to give rise to similar scoring issues again.

Second, we disagree with the Appellant's argument that the scoring issues he raises satisfy the mootness exception of "great public importance," Id. merely because the issues implicate the policy of "fill[ing] positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards." Sec. 230.01(2), Stats. Just about any issue related to the content or scoring of an examination potentially implicates, at least to some degree, the broad policy of using methods that apply the merit principle with adequate civil service safeguards. Yet we do not view the implication of this statutory policy as invariably tantamount to the "great public importance" required to except the mootness doctrine. *Accord* Maday v. DOC & DER, Case No. 92-0838-PC (Pers. Comm. 6/23/93) (rejecting the appellant's arguments that mootness was not a viable basis for dismissal before administrative agencies and that he had a right to know whether the civil service law had been violated, notwithstanding the mootness of the issue involving the effective date of a reclassification). Furthermore, we do not deem the scoring issues herein, especially in light of the particular circumstances giving rise to them, to have great importance to the public. Again, the scoring issues raised in this appeal could have been avoided with even a modicum of care by the Appellant, and no evidence suggests that similar issues have arisen, or are likely to arise again. Moreover, let us assume *arguendo* that the two graders' relatively low scoring of the Appellant's examination resulted primarily from their decision not to "un-transpose" his answers to the first two questions. In that event, the Appellant's challenge to the scoring effectively amounts to faulting the graders for scoring his examination in exactly the same procedural manner that they graded the examinations without transposition errors, and, conversely, for not making the subjective decision to "un-transpose" his responses for his benefit. Even if we were to concur with this highly particularized and self-interested criticism by the Appellant, it is not of such great public importance as to justify our consideration and resolution of moot scoring issues.

Our conclusion applies with even greater force when we consider other decisions in which courts have considered moot issues, based on the exception of having great public importance. These decisions illustrate the public character and degree of importance of the issues required to invoke the exception, and, by way of contrast, reinforce our conclusion that the exception should not be applied under the facts of this appeal. *See, e.g.,* State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶ 9, 334 Wis. 2d 70, 76, 798 N.W.2d 436, 439 (concluding in part that "whether a court can enjoin a bill is a matter of great public importance" and therefore would be addressed, notwithstanding mootness); Town of Rhine v.

Bizzell, 2008 WI 76, ¶ 54, n. 24, 311 Wis. 2d 1, 39, 751 N.W.2d 780, 799 (noting that while constitutional challenges to repealed legislation generally are considered moot, constitutional challenge to repealed ordinance would be reviewed as a matter of great public importance and as likely to arise again, where town could easily revert to previous, challenged version of ordinance and other municipalities utilize similar ordinances); Matter of Guardianship of L.W., 167 Wis. 2d 53, 66-67, 482 N.W.2d 60, 64-65 (1992) (concluding that although death of patient who had been in persistent vegetative state rendered moot appeal from order granting guardian authority to consent to withdrawal of all life sustaining medical treatment, including artificial nutrition and hydration, "[t]he issue of an individual's right to refuse life-sustaining medical treatment (LSMT) [would be considered as one] of great public importance, and [as] capable of repetition but likely to evade review."); In re Commitment of Morford, 2004 WI 5, ¶ 9, 268 Wis. 2d 300, 307, 674 N.W.2d 349, 352 (discussing exceptions to mootness and observing in part that "[t]he release of a chapter 980 committee is an issue of great public importance because it implicates both the safety of the public and the rights of the detained individual."); In re Commitment of Schulpius, 2006 WI 1, ¶ 16, 287 Wis. 2d 44, 54, 707 N.W.2d 495, 500 (deciding in part that Supreme Court would review, as a matter of great public importance, moot issues that sex offender raised in appeal from trial court's denial of his motion to enforce trial court's earlier decision that offender should be released from secure custody, where issues implicated both safety of public and rights of detained individual, and issues presented recurred with some frequency); In re Commitment of Elizabeth M.P., 2003 WI App 232, n. 4, 267 Wis. 2d 739, 757, 672 N.W.2d 88, 97 (deciding that appeal from denial of committed individual's motion to release her from inpatient treatment under commitment order and return her to outpatient status would be considered, even though termination of commitment order may have rendered appeal moot, because issue affecting the liberty interests of all persons subject to an involuntary commitment was of great public importance.); In re Michael S., 2005 WI 82, ¶ 7, 282 Wis. 2d 1, 6, 698 N.W.2d 673, 676 (concluding that even though juvenile had turned 18 and thus was no longer subject to the juvenile code, moot issue of "a circuit court's retention of authority over a juvenile after the expiration of a dispositional order" would be considered, in part, as "a matter of great importance to the sound operation of the judicial system and the rights and interests of juveniles."); State ex rel. Riesch v. Schwarz, 2005 WI 11, ¶¶ 15, 278 Wis. 2d 24, 27, 692 N.W.2d 219, 220 (addressing as matter of great public importance likely to arise with sufficient frequency, moot issue of "whether an inmate . . . can have the status as a parolee and be subject to revocation proceedings even though he has not been released from physical custody."); Roth v. Lafarge School Dist. Bd. of Canvassers, 2004 WI 6, ¶ 14, 268 Wis. 2d 335, 345-346, 677 N.W.2d 599, 604 (deciding that whether the school district's referendum on school building project passed was a matter of great public importance, and thus, the Supreme Court would review voter's challenge to Board of Canvassers' disqualification of "yes" vote, even if issue were to become moot if new referendum were to pass.); Kabes v. School Dist. of River Falls, 2004 WI App 55, ¶ 3, n.1, 270 Wis. 2d 502, 505, 677 N.W.2d 667, 669 (finding

as matter of great public importance and likely to arise again, "statutory question of first impression: whether a school board's power to assign its administrators administrative responsibilities under Wis. Stat. § 118.24(3) preempts an administrator's employment contract created by § 118.24(1) and (6)."); Portage Daily Register v. Columbia County Sheriff's Dept., 2008 WI App 30, ¶ 8, 308 Wis. 2d 357, 746 N.W.2d 525 (viewing "as sufficiently important and capable of evading review" so as to except mootness doctrine, issue of whether sheriff's department's transmission of investigative report to district attorney entitled sheriff's department to deny public records request of such report based on common law categorical exception for records in the custody of a district attorney's office); State ex rel. Milwaukee County Personnel Review Bd. v. Clarke, 2006 WI App 186, ¶32, 296 Wis. 2d 210, 225, 723 N.W.2d 141, 149 (finding in part that where sheriff refused to abide by order of County Personnel Review Board (PRB) with which he disagreed, "enforcing the authority of the PRB [was] a matter of great public importance" as an exception to mootness); Heitkemper v. Wirsing, 194 Wis. 2d 182, 188 n. 2, 533 N.W.2d 770 (1995) (electing to consider issue of sheriff's authority to terminate and demote deputy, even though the complaining deputy had subsequently been elected sheriff, because "the sheriff's power to terminate and demote a deputy are important issues that are likely to recur in the future").

In sum, given the nature of the scoring issues and the circumstances in which they arose – the Appellant's substantial negligence in causing his transposition errors; the low-scoring graders' procedural consistency in their presumed decision not to adjust his score subjectively for his benefit; the particular and apparently infrequent nature of such errors, and the individual (as opposed to public) character of the issues – especially in contrast to issues in decisions applying the exception – we do not view the scoring issues herein as having the great public importance required to except mootness.

IV. The Appellant's Request for Summary Judgment

Because we conclude that the issues raised by the Appellant are moot, that none of the exceptions to mootness applies, and that the Respondents are entitled to summary judgment, we deny the Appellant's request for summary judgment.

CONCLUSION

In light of the foregoing analysis, as the parties moving for summary judgment, the Respondents have met their burden to show that this appeal should be dismissed as moot. Accordingly, the Commission hereby grants the Respondents' motion for summary judgment, denies the Appellant's request for summary judgment, and dismisses this appeal with prejudice.

Dated at Madison, Wisconsin, this 9th day of July, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

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